DEFINITE AND INDEFINITE FAILURE OF ISSUE.

For a long time, there existed a curious, tangled and very much befogged question about the meaning and legal effect of the words "dying without issue", or "without heirs". The question would arise where the testator gave an estate to one, but over to another on the first taker "dying without issue". The contention on one hand was that the words meant a "definite failure of issue", a failure that was definite and final at the death of the first taker, that is that he left no issue him surviving; and on the other hand that the meaning was an "indefinite failure of issue", a failure indefinite as to time, a failure that might occur at any time in the future. The bare statement of what the question was, shows that it ought never to have been entertained.

It is a plain proposition that "dying without issue" *must* mean one of two things: either never having had issue during one's life, or leaving no issue living *at one's death.* If the will had said "dying without having had any issue born to him" a contention could be raised that the bare birth of issue defeated the contingent gift over, and irrevocably vested the fee in the first taker, although such issue may have died the day after birth. But testators did not use that language. They said "dying without issue" and the contention never has been that this meant "die without having had issue born to him". The contention was that they meant an indefinite failure of issue, indefinite as to time, failure at some indefinite time in the future, failure after the death of the first taker.

Now the wills never did say "if his issue shall at any time hereafter become extinct". They simply said "if he shall die without issue", and the only question was whether that meant leaving living issue him surviving, or meant a failure, an extinction, of issue, at some future time in no way defined or limited. And such contention arose, *and was sustained,* whether the first taker left issue surviving him or not. It is a perfectly plain proposition that if a man dies, leaving issue surviving him, he does not "die without is-

sue" and equally plain that any speculation as to whether that issue will, *thereafter* become extinct, was verging as closely upon the absurd as grave and learned judges ever allowed themselves to go. And yet the courts took the matter seriously, and, by imputing a strained and unnatural meaning to the words used, converted the simple language of every day life into a cemetery for the interment of testamentary intentions.

More recent judicial decisions, and statutory provisions have rendered most of the old learning on the subject obsolete. It is now generally held by the courts, or determined by statute, that dying without issue means without issue living at the death of the person referred to. Section 38 of the Real Property Law of New York says: "Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue the word 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." But there is enough of the matter left in the books, and enough possibility left that the question may still arise under other forms of expression, to justify the inquiry: What did indefinite failure of issue mean? What definitions of it have been given? And how could it be applied to the actual language and the actual facts of the cases where it was applied?

Treated in this way, I have never seen any definition, explanation or application of the words "indefinite failure of issue" that had both sense and possibility. Of course, if the language of the will had been: "If B's issue shall at any time after his death, become extinct," that would have been an indefinite failure. The application would have been sensible and easily understood, and such future failure of issue would have been both possible, and also uncertain as to time and, therefore, wholly indefinite. But testators did not use that language. The words were "dying without issue"—Without issue when? Palpably, *when he died.* "Dying" was always used, in such instruments, not to describe the act or process of dying, but the *fact of being dead.*

Assume that testator died January 1, 1904, giving an estate to A, and if A dies without issue, over to B; and

that A died January 1, 1905, never having had issue born to him. Does the omission of the words "living at his death" or the words "him surviving at his death" raise any doubt that A died without issue. Or does it create any possibility that, never having had any such issue during his life, he may beget offspring after his death, and that the issue of such offspring may become extinct at some remote "indefinite" period in the future?

If the words had been "Should A have no living issue born to him during his life time, nor within the period of gestation after his death", that would have been a very definite failure. And as he cannot have issue after his death and the lapse of the period of gestation thereafter, how does this multiplication of words add anything to the meaning of "dying without issue"? And, only those three words being used, suppose A had issue born to him May 1, 1904, which died October 1, 1904, then when A died January 1, 1905, did he die with or without issue? And suppose that the issue born May 1, 1904, was still alive when the controversy arose over the question in February, 1906, did A die without issue on January 1, 1905? He did not because that issue was living at his death. But the contention is that the issue of the surviving issue of A, and even the issue of that issue may hereafter become extinct, and because the time when it may become extinct is unknown, the words import an indefinite failure of issue. If that is not the precise meaning of the contention, I have been unable to discover it.

If the testator had said—"Should the issue of A, at any time hereafter become extinct," that would have described an indefinite failure. But the controversy did not arise out of such language. The indefinite failure was an invention and was supposed to be contained or hidden in words which the testator and his legal adviser thought contained only a very definite failure.

Any attempted perpetuity intended to tie up property, or leave it hanging in the air untied, until the issue of a designated person shall become extinct, any gift over based on such a contingency, would be an indefinite failure of issue and would be contrary to the statutes; and, without any statute, would be too remote, and would fail for uncer-

tainty. But the question did not arise out of any such attempts. To hold that the issue living at the death shall not take because that issue may die without issue, or because the issue of that issue may thereafter become extinct, is doing violence to language as well as to intent. It does not attain the dignity of a metaphysical conundrum or a legal technicality.

What do the books say?

Anderson's Law Dictionary says: "A definite failure of issue occurs when a precise time is fixed by a will for the failure of issue. An indefinite failure of issue is the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to a particular time or event."

A standard and useful work of reference says: "Words referring to the death of a person without issue, such as 'if he die without issue', 'if he have no issue' or 'for want' or 'in default of issue', standing alone import a general indefinite failure of issue and not a failure at the death of the first taker simply: that is, they import a failure at the death of the first taker or any time thereafter. While the words 'die without issue' presumably refer to an indefinite failure of issue, this presumption will yield to a contrary intent apparent from examination of the whole will, and the courts have seized with avidity on any circumstances, however trivial, denoting an intention to fix the contingency at the time of death."[1]

These definitions are easily understood. But in some jurisdictions where the application to facts is not controlled by statute or not thoroughly settled by adjudication, circumstances denoting an intention to fix the contingency at the time of death may not be seized with as much "avidity" as in others. There is evidently enough of the old doctrine left to justify the inquiry as to its reasonableness under the facts of the cases to which it was applied. The cases are so numerous that only two will be selected by way of illustration.

In Fosdick *v.* Cornell,[2] the language of the will was:

[1] 17 Am. & Eng. Ency. Law (2d Ed.) page 558–560.

[2] (N. Y. 1806) 1 Johnson, 439.

"If any of my said sons, William, Jacob, Thomas and John, or my daughter Mary shall happen to die without heirs male of their own bodies, that then the lands shall return to the survivors to be equally divided between them."

The opinion of Judge Thompson, approved by the whole court, says:

"This is a question construction depending on the intention of the testator, and from the whole will taken together, I cannot entertain a doubt that he meant to provide that in case any of the devisees named in this clause should die without leaving male issue at the time of his death, his portion shall be divided among the survivors."

The court was composed of Kent, Chief Justice, and Livingston, Thompson, Spencer, Tompkins, Associate Justices. The decision was evidently right and is one of the earliest cases showing a disposition to break away from the fetters of the old rule.

In a later case, Anderson *v.* Jackson,[1] decided in 1819 by the Court of Errors of the State of New York, the language of the will was:

"Item. It is my will and I do so order and appoint that, if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor, and in case of both their deaths without lawful issue, then I give all the property aforesaid to my brother John Eden of Loftus in Cleveland, in Yorkshire, and my sister Hannah Johnson of Whitby in Yorkshire and their heirs."

In that case, Chancellor Kent wrote an elaborate and learned opinion, in which he said:[2]

"The Courts of Justice have therefore wisely and steadily determined that they would not permit these executory devises to tie up property beyond a moderate and reasonable period. They have determined that the contingency of the executory devise must happen within a life or lives in being and twenty-one years afterwards. This is the utmost length to which property can be tied up by an executory devise, and, if it attempts to go beyond that limit, it is void. . . . This rule is the cause of the struggle so often seen in the books and witnessed in this

[1] 16 Johnson 382. [2] Id. pp. 399, 400.

very case about the meaning of the words *dying without issue* and whether they mean a dying without issue living at the very time of death of the first taker, or whether they mean a general or indefinite failure of issue. I was surprised to hear it said at the argument of this cause that it was not easy to understand what was meant by an indefinite failure of issue. There is scarcely a case on the subject within the last two hundred years but what mentions and alludes to this expression and this extent of failure of issue. A definite failure of issue is when a precise time is fixed by the will for the failure of issue. The time is then defined or definite. As, for instance, if the will in this case had declared that the property should pass over to *Medcef* if *Joseph* had no issue by the first of *January*, 1810, or, if, instead of saying in the words of the will *and if he depart this life without lawful issue*, it had said, *And if my son Joseph shall die without having any issue living at the time of his death*, there could have been no contention but that here was intended a definite failure of issue. Now a general or indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue whenever it shall happen, sooner or later, without any fixed, certain, definite period within which it must happen. It means when the issue of the descendants of the son shall become extinct without reference to any particular time or any particular event. An executory devise upon such an indefinite failure of issue is void because the period when the contingency on which the remainder over depends must happen is too remote or uncertain. Such an executory devise might tie up property for generations and lead to a perpetuity, or property perpetually inalienable."

Now, referring again to the terms of the will and referring to Kent's own language that a definite failure of issue must be a failure occurring at the death of the first taker, most readers will experience the same difficulty in understanding what was meant by an indefinite failure of issue, *as applicable to the facts in hand*, that was expressed by the bar in the argument of that case to the surprise of the great Chancellor.

The Chancellor proceeds in his opinion:[1]

[1] Id. pp. 400, 401.

"It has been repeated in the books from case to case that testators generally mean by the words *dying without issue* or *departing this life without lawful issue* or other words of similar import, a failure of issue at the time of the death of the devisee, and that they do not mean a general or indefinite failure of issue. This is said to be the meaning of the words in common parlance or usage. I am rather inclined to think, however, that this notion of what the testator intended has been borrowed by one judge from another without much reflection or examination as to its truth. I doubt the truth of the fact . . . I incline to think that in nineteen cases out of twenty the testator really means a general or indefinite failure of issue."

To put the matter mildly, the last sentence is an astonishing statement.

The Chancellor in his long opinion, referring to the previous case of Fosdick *v.* Cornell,[1] says:[2]

"I was at that time Chief Justice of the Supreme Court, and, though I did not give the opinion, I will not shelter myself under that silence. I am free to say that I partook of its error, but I should be unworthy of public confidence if, with more experience and more examination, having detected myself in error, I should now be ashamed to confess it. I discovered years ago that the case of Fosdick *v.* Cornell was decided upon mistaken grounds. The Court, however, have this apology for themselves that, without much examination and without looking as they ought to have done, deeply into the subject, they were led astray out of the beaten track by such a distinguished leader as Lord Kenyon."

Perhaps the noblest element of judicial strength is the courage to admit an error when discovered. The lamentable part of this instance of judicial courage is that no error had been committed in the previous case, and that it was an instance of a great judge taking a long step backwards. And it is the more remarkable because, as evidenced by the concurring opinion of Senator Hammond,[3] the reasoning was based largely on the wholly unreasonable ground so often supported by judicial authority in times past, that, as to personalty, "dying without issue" means without

[1] (N. Y. 1806) 1 Johnson 439. [2] (1819) 16 Id. 415. [3] Id. pp. 424–434.

issue at the death, while as to realty the meaning of the same words is an indefinite failure of issue in the undefined and unlimited future.

Senator Yates opposed a reversal and argued for affirmance, basing himself partly on Fosdick *v.* Cornell, and largely on the common sense applicable to the language in hand. In a short opinion of only three pages, he says:[1]

"I hold it to be a well-settled rule of construction that the terms used in a will are to be understood in their popular sense, unless opposed to some rigid, unbending rule of law. Now no one can hesitate for a moment as to the meaning of the testator in the case before us. He clearly intended that if either of his two sons should die without lawful issue, the survivor should take the whole which was devised to both; and the only question is whether there is any inflexible, rigid rule of law to wrest the plain and manifest intention of the testator to a purpose altogether different to what he intended."

Eight Senators concurred with Kent and Hammond, and thirteen concurred with Yates, so that Fosdick *v.* Cornell was not overruled. It never has been overruled since, and its principle is now statutory law in New York.

Such statutes have not been adopted in all of the States, and it remains an interesting question how long it will continue to be true that the words "dying without issue" will be held presumably to mean an indefinite failure of issue, and how long it will take the courts, without legislative assistance, to make the judicial ruling upon this subject unanimous throughout the land. It is believed that the time is not far distant when all this learning about definite and indefinite failure of issue will come to be considered as much of a curiosity, and, to many minds, as much of a puzzle, as the now exploded rule in Shelley's Case.

The law is a great and noble profession; but one danger both to the bar and the bench is a tendency to too much refinement, too much of what is called technicality. Technical reasoning is nearly always intensely logical, if the premises be accepted as sound; but the difficulty is, that the premises are often based upon fossilized rules that have ceased to have the breath of life in them, because the

[1] Id. p. 435.

reason of the rules has ceased to exist. In forensic reasoning and in judicial decisions it is often well to examine the ancient foundations of the law. But it is also indispensable that the latest growths, the latest fruits, the latest flowers that promise fruit, should be examined carefully. It is always wholesome that the judicial pruning hook should be applied, not only to the dead limbs of the law, but also to cutting asunder the old, diseased or fossilized roots that no longer furnish any nutriment to modern legal reasoning.

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